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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 EASTERN DIVISION
11

12 VILMA MONTES,) No. CV 08-6668 CW
13)
14 Plaintiff,) DECISION AND ORDER
15 v.)
16)
17 MICHAEL J. ASTRUE,)
18 Commissioner, Social)
19 Security Administration,)
20)
21 Defendant.)
22 _____)
23

24 The parties have consented, under 28 U.S.C. § 636(c), to the
25 jurisdiction of the undersigned magistrate judge. Plaintiff seeks
26 review of the denial of disability benefits. The court finds that
27 judgment should be granted in favor of defendant, affirming the
28 Commissioner's decision.

24 I. BACKGROUND

25 Plaintiff Vilma Montes was born on July 23, 1945, and was sixty-
26 one years old at the time of her administrative hearing.
27 [Administrative Record ("AR") 32, 766.] She has a college education
28 and past relevant work experience as a credit counselor and general

1 clerk [AR 27.] Plaintiff alleges disability on the basis of cancer,
2 migraines, allergies, hearing loss, back pain, and loss of energy. [AR
3 22.]

4 **II. PROCEEDINGS IN THIS COURT**

5 Plaintiff's complaint was lodged on October 9, 2008, and filed on
6 October 16, 2008. On April 22, 2009, defendant filed an answer and
7 plaintiff's Administrative Record ("AR"). On July 22, 2009, the
8 parties filed their Joint Stipulation ("JS") identifying matters not
9 in dispute, issues in dispute, the positions of the parties, and the
10 relief sought by each party. This matter has been taken under
11 submission without oral argument.

12 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

13 Plaintiff applied for a period of disability and disability
14 insurance benefits ("DIB") on March 24, 2005, alleging disability
15 since September 1, 2002. [AR 22.] After the application was denied
16 initially and on reconsideration, plaintiff requested an
17 administrative hearing, which was held on September 18, 2006, before
18 Administrative Law Judge ("ALJ") Sally Reason. [AR 766.] Plaintiff
19 appeared with counsel, and testimony was taken from Plaintiff and
20 vocational expert Gregory Jones. [AR 767.] The ALJ denied benefits in
21 a decision dated December 21, 2006. [AR 28.] When the Appeals
22 Council denied review on August 15, 2008, the ALJ's decision became
23 the Commissioner's final decision. [AR 5.]

24 **IV. STANDARD OF REVIEW**

25 Under 42 U.S.C. § 405(g), a district court may review the
26 Commissioner's decision to deny benefits. The Commissioner's (or
27 ALJ's) findings and decision should be upheld if they are free of
28 legal error and supported by substantial evidence. However, if the

1 court determines that a finding is based on legal error or is not
 2 supported by substantial evidence in the record, the court may reject
 3 the finding and set aside the decision to deny benefits. See Aukland
 4 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.
 5 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240
 6 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,
 7 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
 8 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada
 9 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

10 "Substantial evidence is more than a scintilla, but less than a
 11 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
 12 which a reasonable person might accept as adequate to support a
 13 conclusion." Id. To determine whether substantial evidence supports
 14 a finding, a court must review the administrative record as a whole,
 15 "weighing both the evidence that supports and the evidence that
 16 detracts from the Commissioner's conclusion." Id. "If the evidence
 17 can reasonably support either affirming or reversing," the reviewing
 18 court "may not substitute its judgment" for that of the Commissioner.
 19 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

20 **V. DISCUSSION**

21 **A. THE FIVE-STEP EVALUATION**

22 To be eligible for disability benefits a claimant must
 23 demonstrate a medically determinable impairment which prevents the
 24 claimant from engaging in substantial gainful activity and which is
 25 expected to result in death or to last for a continuous period of at
 26 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at
 27 721; 42 U.S.C. § 423(d)(1)(A).

28 Disability claims are evaluated using a five-step test:

1 Step one: Is the claimant engaging in substantial
2 gainful activity? If so, the claimant is found not
3 disabled. If not, proceed to step two.

4 Step two: Does the claimant have a "severe" impairment?
5 If so, proceed to step three. If not, then a finding of not
6 disabled is appropriate.

7 Step three: Does the claimant's impairment or
8 combination of impairments meet or equal an impairment
9 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
10 so, the claimant is automatically determined disabled. If
11 not, proceed to step four.

12 Step four: Is the claimant capable of performing his
13 past work? If so, the claimant is not disabled. If not,
14 proceed to step five.

15 Step five: Does the claimant have the residual
16 functional capacity to perform any other work? If so, the
17 claimant is not disabled. If not, the claimant is disabled.

18 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
19 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
20 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20
21 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or
22 "not disabled" at any step, there is no need to complete further
23 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

24 Claimants have the burden of proof at steps one through four,
25 subject to the presumption that Social Security hearings are non-
26 adversarial, and to the Commissioner's affirmative duty to assist
27 claimants in fully developing the record even if they are represented
28 by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
1288. If this burden is met, a prima facie case of disability is
made, and the burden shifts to the Commissioner (at step five) to
prove that, considering residual functional capacity ("RFC")¹, age,

¹ Residual functional capacity measures what a claimant can still do despite existing "exertional" (strength-related) and "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to work without directly limiting strength, and include mental, sensory, postural, manipulative, and environmental limitations. Penny v.

1 education, and work experience, a claimant can perform other work
2 which is available in significant numbers. Tackett, 180 F.3d at 1098,
3 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

4 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

5 Here, the ALJ found that plaintiff had not engaged in substantial
6 gainful activity since her alleged disability onset date (step one);
7 that plaintiff had "severe" impairments, namely breast cancer in
8 remission, degenerative disc disease of the lumbar spine, and migraine
9 headaches (step two); and that plaintiff did not have an impairment or
10 combination of impairments that met or equaled a "listing" (step
11 three). [AR 27.] Plaintiff was found to have an RFC enabling her to
12 lift twenty pounds occasionally, lift and carry up to ten pounds
13 frequently, walk and stand for six hours in an eight-hour workday, and
14 avoid concentrated exposure to noise. [AR 28.] The vocational expert
15 testified that this RFC would enable Plaintiff to return to her past
16 relevant work as a credit counselor or general clerk (step four).
17 [Id.] Accordingly, plaintiff was found not "disabled" as defined by
18 the Social Security Act. [Id.]

19 **C. ISSUES IN DISPUTE**

20 The parties' Joint Stipulation sets out the following disputed
21 issues:

- 22 1. Whether the ALJ properly considered the opinion of the state
23 agency physician regarding Plaintiff's limitations in
24 reaching;
- 25 2. Whether the ALJ properly considered Plaintiff's medication

26
27 Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155
28 n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 side effects;

2 3. Whether the ALJ properly considered the opinion of an
3 examining physician; and

4 4. Whether the ALJ posed a complete hypothetical question to
5 the vocational expert.

6 [JS 2-3.]

7 **D. ISSUE ONE: STATE AGENCY REVIEW PHYSICIAN'S OPINION**
8 **PERTAINING TO REACHING LIMITATIONS**

9 **Background**

10 In July 2005, Plaintiff had an internal medicine consultation
11 performed by Dr. Seung Ha Lim. [AR 274-78.] Plaintiff complained of a
12 history of breast cancer, headaches, hypertension, back pain, right
13 arm pain and a hearing deficit. [AR 274.] Dr. Lim reviewed
14 Plaintiff's medical history, reviewed submitted medical records, and
15 administered a physical examination including formal testing and
16 observations. [AR 274-76.] Dr. Lim noted that Plaintiff's breast
17 cancer was in remission and found, among other things, that her
18 hearing was grossly normal bilaterally, that an MRI of her head taken
19 in April 2005 was normal, that she had an optimal blood pressure
20 reading without signs of congestive heart failure, that she
21 experienced pain while moving her back based on "paravertebral
22 tenderness and decreased range of motion of the back without any signs
23 of radiculopathy," and that she had a normal range of motion in both
24 of her upper extremities. [AR 276-78.] Based on these examination
25 findings, Dr. Lim recommended that Plaintiff be limited from a
26 functional standpoint to light work: sitting, standing and/or walking
27 about six hours in an eight-hour workday with appropriate breaks,
28 lifting and/or carrying twenty pounds occasionally and ten pounds

1 frequently, unlimited pushing/pulling, and occasional climbing and
2 stooping. [AR 278.]

3 One month later, in August 2005, Dr. E. Fonte, a state agency
4 review physician, completed a Physical Residual Functional Capacity
5 Assessment based on review of the record, including the examination
6 record of Dr. Lim. [AR 280-87.] Dr. Fonte's functional assessment was
7 the same as Dr. Lim's with the exception that Dr. Fonte stated that
8 Plaintiff should be limited from reaching in all directions, including
9 no reaching above shoulder level. [AR 283.] Dr. Fonte further noted
10 that his opinion regarding Plaintiff's limitations and restrictions
11 was not significantly different from those in the file and therefore,
12 offered no explanation for the departure. [AR 286.]

13 The Commissioner's Finding

14 In the administrative decision, the ALJ noted the evaluations of
15 both Dr. Lim and Dr. Fonte, including the clinical findings recorded
16 by Dr. Lim. [AR 25.] On the basis of this record, the ALJ made an RFC
17 finding that the ALJ described as "roughly consistent" with the
18 assessments of Dr. Lim and Dr. Fonte. [AR 27.] The ALJ found that
19 Plaintiff had a functional capacity equivalent to light work, as noted
20 above, but the RFC finding did not include the reaching limitation
21 noted by Dr. Fonte. [Id.] Plaintiff asserts that the ALJ improperly
22 ignored this aspect of Dr. Fonte's opinion and therefore, it was
23 reversible error. [JS 3-5.]

24 Discussion

25 Under the Commissioner's regulations, state agency medical
26 physicians and other program physicians are considered highly
27 qualified experts in the area of Social Security disability
28 evaluations, and their evaluations must be considered by the

1 Commissioner as opinion evidence except for the ultimate determination
2 of disability. 20 C.F.R. § 404.1527(f)(2)(I). However, the opinion
3 of a non-examining physician is normally entitled to less deference
4 than that of an examining and treating physician precisely because of
5 a lack of opportunity to conduct an independent examination and lack
6 of a treatment relationship with the claimant. Benecke v. Barnhart,
7 379 F.3d 587, 592 (9th Cir. 2004); Andrews v. Shalala, 53 F.3d 1035,
8 1040-1041 (9th Cir. 1995)(explaining greater weight given to opinions
9 of treating and examining physicians because they have a greater
10 opportunity to know and observe the patient as an individual).
11 Standing alone, the opinion of a non-examining physician cannot
12 constitute substantial evidence that justifies the rejection of the
13 opinion of either an examining physician or a treating physician.
14 Widmark v. Barnhart, 454 F.3d 1063, 1067 n. 2 (9th Cir. 2006); Morgan
15 v. Commissioner of the Social Security Administration, 169 F.3d 595,
16 602 (9th Cir. 1999); see also Erickson v. Shalala, 9 F.3d 813, 818 n.
17 7 (9th Cir. 1993)("'[T]he non-examining physicians' conclusion, with
18 nothing more, does not constitute substantial evidence, particularly
19 in view of the conflicting observations, opinions, and conclusions of
20 an examining physician.'"(quoting Pitzer v. Sullivan, 908 F.2d 502,
21 506 (9th Cir. 1990))).

22 Here, the Commissioner's omission of the reaching limitation, as
23 found by Dr. Fonte, in the determination of Plaintiff's RFC was
24 supported by substantial evidence. Dr. Fonte's finding as to this
25 limitation, to the extent that it departed from the finding of the
26 examining physician, Dr. Lim, was unexplained and not supported by the
27 record on the whole. As the ALJ noted, Dr. Lim found that Plaintiff
28 had a normal range of motion in her upper extremities upon

1 examination, and a review of the record indicates no medical evidence
2 supporting a different finding. Under these circumstances, the
3 opinion of Dr. Fonte, standing alone, does not warrant reversal of the
4 Commissioner's finding on this claim. See Widmark v. Barnhart, 454
5 F.3d at 1067 n. 2.

6 **E. ISSUE TWO: MEDICATION SIDE EFFECTS**

7 Plaintiff further asserts that the Commissioner's decision is
8 erroneous because the ALJ failed to account for medication side
9 effects. [JS 7-13.] In support of the claim, Plaintiff provides a
10 lengthy list of medications that she has been prescribed and lists
11 their possible side effects as described by a drug website; Plaintiff
12 also references a statement by Dr. Joseph Nassir, an examining
13 physician, that "some" of Plaintiff's medications "may cause" some of
14 her present symptoms but without explanation of what those symptoms
15 were. [JS 8-13; AR 690.] Plaintiff does not specify which of these
16 side effects she actually suffers, nor does Plaintiff cite any
17 evidence that she has medication side effects. A review of the record
18 does not indicate any evidence that Plaintiff suffers from the side
19 effects listed, other than the single, non-specific reference to her
20 medications made by Dr. Nassir.² Under these circumstances, the ALJ
21 was not required to make a further inquiry. See Bayliss v. Barnhart,
22 427 F.3d 1211, 1217 (9th Cir. 2005)(ALJ not required to analyze
23 medication side effects, among other things, when such limitations
24 were "neither credible nor supported by the record"); cf. Varney v.
25 Secretary of Health and Human Services, 846 F.2d 581, 585 (9th Cir.

26
27 ² As discussed below, the ALJ provided specific and legitimate
28 reasons supported by substantial evidence in the record to discount
Dr. Nassir's opinion.

1 1987)(requiring further inquiry as to medication side effects when
2 claimant gave specific testimony as to severity of side
3 effects)(modified by 859 F.2d 1396 (9th Cir. 1988)).

4 **F. ISSUES THREE AND FOUR: DR. NASSIR**

5 **Background**

6 In August 2006, Plaintiff underwent a physical examination
7 performed by Dr. Nassir for the chief complaint of "severe headaches
8 two to three times a day." [AR 688.] Dr. Nassir noted that Plaintiff
9 started developing the migraine headaches in 1979 and that they
10 included episodes of nausea and vomiting. [Id.] Dr. Nassir noted that
11 Plaintiff's medical history included a history of chronic migraine
12 headaches, osteoporosis, hypertension, hyperlipidemia, status post
13 bilateral breast cancer, constipation, anxiety, depression,
14 gastroesophageal reflux disease, insomnia, conjunctivitis, jaw pain,
15 chronic diaphoresis, chronic nausea, vertigo, dizziness, anemia, and
16 neck and back pain. [AR 688.] Dr. Nassir's neurologic evaluation of
17 Plaintiff resulted in the following findings:

18 The patient is alert, awake, oriented x3. Cranial nerve II
19 through XII intact. Motor is 5/5. Reflexes are 3/4. Sensory
20 intact in the upper and lower extremities. No other focal
21 deficits were noted. Neck and back examination revealed a
22 significant amount of range of motion decreased in the neck,
23 especially with forward and lateral rotations of about 20% to
24 30%. Back: There is also decreased range of motion especially
25 with the forward flexion and lateral rotation of 20% to 30%.
26 There is moderate amount of pain noted on the right back side
27 area, radiating down to the leg in the sciatic portion down to
28 the right leg and the foot as well also.

1 [AR 690.]

2 Dr. Nassir concluded that "[t]he patient is unable to perform
3 work activities on a sustained, regular basis; therefore, Mrs. Montes
4 is considered to be disabled at this time." [AR 691.]

5 **The Commissioner's Finding**

6 In the administrative decision, the ALJ rejected the findings of
7 Dr. Nassir and did not incorporate the findings as to Plaintiff's
8 decreased range of motion in the neurological evaluation. [AR 26.]

9 The ALJ cited the following reasons to discount Dr. Nassir's opinion:

10 (1) it appeared that the examination was a "medical-legal report by a
11 non-treating physician who saw the claimant for the sole purpose of
12 aiding her attempt to qualify for disability benefits"; (2) the report
13 contained only a " cursory physical examination which does not support
14 Dr. Nassir's allegation that the claimant cannot perform even
15 sedentary work"; (3) Plaintiff had denied having any psychiatric
16 problems and there was no evidence of a "severe" mental impairment.

17 [AR 26-27.] The ALJ's decision also referenced clinical evidence that
18 called into question Plaintiff's claim of disability, including, among
19 other things, four MRI studies of Plaintiff's brain that were normal,
20 treating physician notes that did not indicate any significant
21 neurological abnormalities, a consultative psychiatric examination
22 that concluded Plaintiff was capable of handling the stresses and
23 demands of gainful employment, and treatment notes indicating
24 Plaintiff received conservative treatment for back pain. [AR 25.]

25 Plaintiff asserts in Issue Three that the ALJ's rejection of Dr.
26 Nassir's opinion, particularly the failure to address the limitations
27 found in Dr. Nassir's neurological evaluation, was reversible error.

28 [JS 16-17.] Plaintiff further asserts in Issue Four that these

1 limitations should have been incorporated in the hypothetical question
2 posed to the vocational expert at the administrative hearing. [JS 20.]

3 **Discussion**

4 Ninth Circuit cases distinguish among the opinions of three types
5 of physicians: those who treat the claimant (treating physicians),
6 those who examine but do not treat the claimant (examining or
7 consultative physicians), and those who neither examine nor treat the
8 claimant (non-examining physicians). Lester v. Chater, 81 F.3d 821,
9 830 (9th Cir. 1995); see also Orn v. Astrue, 495 F.3d 625, 631 (9th
10 Cir. 2007). The opinion of a treating physician is given deference
11 because he is employed to cure and has a greater opportunity to know
12 and observe the patient as an individual. Orn v. Astrue, 495 F.3d at
13 633; Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987). The
14 opinion of an examining physician is, in turn, entitled to greater
15 weight than the opinion of a nonexamining physician. Orn v. Astrue,
16 495 F.3d at 631; Lester v. Chater, 81 F.3d at 830. Where the opinion
17 of a treating or examining physician is uncontroverted, the ALJ must
18 provide clear and convincing reasons, supported by substantial
19 evidence in the record, for rejecting it. If contradicted by that of
20 another doctor, a treating or examining source opinion may be rejected
21 for specific and legitimate reasons that are based on substantial
22 evidence in the record. Valentine v. Commissioner of Social Sec., 475
23 F.3d 684, 692 (9th Cir. 2009); Ryan v. Commissioner of Social Sec.,
24 528 F.3d 1194, 1198 (9th Cir. 2008); Bayliss v. Barnhart, 427 F.3d
25 1211, 1216 (9th Cir. 2005); Lester v. Chater, 81 F.3d at 830-831.³

26
27 ³ Although the Ninth Circuit applies the same legal standard in
28 determining whether the Commissioner properly rejected the opinion of
examining and treating doctors - specific and legitimate reasons

1 Here, on the whole, the reasons provided by the ALJ to reject the
2 opinion of Dr. Nassir, the examining physician, satisfied this
3 standard. The ALJ reasonably found that Dr. Nassir's opinion was
4 conclusory and inadequately supported by clinical findings. See
5 Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Holohan v.
6 Massanari, 246 F.3d 1195, 1202 n. 2 (9th Cir. 2001)(holding that
7 medical opinion is "entitled to little if any weight" where the
8 physician "presents no support for her or his opinion"). Moreover,
9 Dr. Nassir's opinion was in conflict with substantial evidence in the
10 record, such as the opinion of the consultative psychiatric examiner
11 that Plaintiff had no psychologically-related limitations in her
12 ability to handle gainful employment and Plaintiff's denial of severe
13 psychiatric problems. See Batson v. Commissioner of Social Sec.
14 Admin., 359 F.3d 1190, 1195 (9th Cir. 2004)(holding that ALJ may
15 discredit medical opinion regarding degree of impairment that is
16 conclusory, brief and unsupported by the record as a whole)(citing
17 Tonapetyan, 242 F.3d at 1149). Accordingly, Issues Three and Four are
18 without merit.

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25 supported by substantial evidence in the record - it is also
26 recognized that the opinion of a treating physician is entitled to
27 greater deference than that of an examining physician. Lester v.
28 Chater, 81 F.3d at 831 n. 8. Accordingly, "reasons that may be
sufficient to justify the rejection of an examining physician's
opinion would not necessarily be sufficient to reject a treating
physician's opinion." Id.

V. ORDERS

Accordingly, **IT IS ORDERED** that:

1. The decision of the Commissioner is **AFFIRMED**.

2. This action is **DISMISSED WITH PREJUDICE**.

3. The Clerk of the Court shall serve this Decision and Order and the Judgment herein on all parties or counsel.

DATED: November 2, 2009

_____/S/_____
CARLA M. WOHRLE
United States Magistrate Judge